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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 94

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

STORER BROADCASTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

It was urged in the petition for a writ of certiorari that the decision below should be reviewed by this Court because it imposes a drastic limitation upon the rule making powers of the Federal Communications Commission which is inconsistent with decisions of this Court. Respondent's brief in opposition seeks to avoid this issue by denying that the court of appeals' decision has the general impact upon the Commission's rule making authority which its language clearly gives it (Br. 6–9). Respondent argues at considerable length that the decision below was correct for a reason neither reached nor discussed by the lower court, i. e., that the multiple ownership rules allegedly

do not implement the policy upon which the Commission rested them (Br. 10–15) [1] and, upon the basis of this analysis of the case, suggests that the invalidation of the rules cannot raise an important question because the decision below was correct (Br. 15–17). Any decision as to the legality of these rules, which have been in existence for many years and have provided a framework for the ownership and control of broadcast stations in the United States, is obviously important. Furthermore, the legal issue of the interaction of Section 309 (b) of the Communications Act with those sections of the Act conferring rule making authority upon the Commission, which was decided below, is an important question in the future administration of the Communications Act.

There has been no decision prior to the instant case which holds that Section 309 (b) precludes the adoption of a general rule effectively governing the disposition of individual applications.

[1] As part of its argument on this point, respondent erroneously treats the rules as equating the acquisition of an additional station beyond the maximum permitted by the rules with a violation of the antitrust laws, and then contends that a violation of the antitrust laws cannot be found without analysis of those factors which have previously been held relevant to such a determination (Br. 11–12). But the Commission's rules do not purport to adjudicate a violation of antitrust law. They are, instead, an enunciation of Commission policy based in part upon the same general policy considerations of fostering competition and avoidance of monopoly power which underly the antitrust statutes.

Ordinarily, a number of factors may be relevant to the question of whether the grant of a particular application is in the public interest. Every rule which selects one factor as being sufficiently important to warrant a denial, no matter how satisfactory the applicant may be in other respects, has the effect of limiting the scope of inquiry at a hearing to the question of compliance with that rule.[2] But this effect has never been held to be a deprivation of the right to be heard afforded by Section 309 (b).

As pointed out in the petition for certiorari (pp. 16–19) there have been several cases sustaining Commission rules which require the denial of applications in conflict with them. Faced with the decision in *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C. A. D. C.), in which the same court of appeals sustained the Commission's television allocation plan although the court specifically recognized that applications in conflict with the plan would be automatically dismissed, respondent says that a hearing on an application may be validly denied where the rule concerned is one "concerning allocation of fre-

[2] As stated in our petition (page 16), a hearing would have to be held in any case where there is a question of whether the application concerned violates the rule. In the case of an applicant such as respondent who admittedly was the sole owner of the maximum number of stations, and who applied for another station, however, it is clear that such application would violate the rule and there would be no facts to ascertain in such a hearing.

quencies" (Br. 7).[3] But respondent gives no explanation of why Section 309 (b) precludes adoption of the multiple ownership rules and yet permits adoption of a rule which denies a hearing to an applicant for a television channel in a city to which the channel has not been assigned by the general rule.

Again, respondent concedes that a hearing need not be given a person who would operate the station in a manner violative of the Communications Act or other Federal statute (Br. 7–8). *Felman* v. *United States,* unreported, Civil No. 49 C 227, N. D. Illinois, affirmed, 339 U. S. 973, is cited as an example. But the Commission's rules there sustained,[4] which prohibited any future contracts in which the assignor of a station reserved the right to use future time on the station as part of the contract of sale, were based not on a finding of violation of law but on Commission policy derived from basic principles of the Communications Act. See Report and Order adopting the rules, 14 F. R. 179, Vol. 1, Part 3, Pike & Fischer, Radio Regulation, page 91:121.

Even in the case where the Commission's rules require denial of an application because of the broadcast of illegal lotteries, there is nothing in the Communications Act which requires the Com-

[3] The assignment of television channels to particular communities is contained in a table of assignments which is Section 3.606 of the Commission's Rules and Regulations, 47 CFR 3.606.

[4] Sections 3.109, 3.241, 3.659, 47 CFR 3.109, 3.241, and 3.659.

mission to deny a license to one who broadcasts a lottery. This Court sustained the Commission's power to make the rules, *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284, 289–290 (Res. Br. 8), not because anything in the Communications Act absolutely requires the Commission to deny a license to one who broadcasts a lottery, but because the Commission had not abused its discretion in adopting the policy that the broadcast of lotteries is sufficiently serious to warrant denial. It is not the statute, but rather the Commission's policy determination, that prohibits a grant as being contrary to the public interest. The same is true in the present case.

It is of course true that the subject matter of the multiple ownership rules differs from that of the rules previously sustained as valid. What respondent has failed to demonstrate is that the differences have any relevance to the meaning of the hearing requirement in Section 309 (b). In its effort to support the holding of the court below, and to draw a line between what the Commission may and may not do by rule making, respondent has created *ad hoc* rules of law which draw the line merely by placing all previous decisions on one side and the instant case on the other. No reason for the arbitrary location of this line is given. However, even if it be assumed that the multiple ownership rules present a question not directly covered by the clear line of

authorities sustaining other Commission rules, the question presented obviously warrants review by this Court.

The decision of the court below is the first one which finds that Section 309 (b) limits the Commission's rule making powers. It has recently been followed by a decision of the same court holding, solely on the authority of its decision herein, that a rule regulating transmitter equipment could not be enforced without a hearing where a waiver was requested. *City of New York Municipal Broadcasting System v. Federal Communications Commission,* No. 12465, decided May 5, 1955.[5] It is significant that the view of the court below on the scope of its ruling herein, expressed in that decision, is not referred to by respondent. There is no doubt that the holding below will have a serious effect upon the administration of the Communications Act. It runs directly counter to an unbroken series of decisions by this Court and lower courts, and should be reviewed by this Court.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BAKER,
General Counsel,
Federal Communications
Commission.

JULY 1955.

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[5] The decision, as yet unreported, is attached hereto as an appendix.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

No. 12465

CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal From Orders of the Federal Communications Commission

Decided May 5, 1955

Before EDGERTON, WILBUR K. MILLER and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge:* Appellant owns Radio Station WNYC which is duly licensed by the Federal Communications Commission to operate (1) a transmitter at a power of one kilowatt for regular broadcast purposes as a Class II station, and (2) a transmitter at a power of five kilowatts in civil defense emergencies under the so-called CONELRAD project.[1] This appeal relates to an application filed for authority to install a single transmitter, having a rated power of both five

[1] This project's purpose is to broadcast civil defense information during enemy air attacks while simultaneously minimizing the use of the radio signal as a navigational aid to the enemy.

kilowatts and one kilowatt (5/1). Such a transmitter could be used, at different times, for standard broadcast as well as CONELRAD operations by merely throwing a switch.

Appellant's application included a request that the Commission waive any conflict with § 3.41 of its rules which prohibits a Class II broadcast station such as WNYC, with maximum authorized power of 1000 watts, from installing a transmitter with a maximum rated power of more than one kilowatt.[2] Section 1.701 of the Commission's rules provides that "Any provision of the rules may be waived by the Commission, if good cause therefor exists."[3]

Without hearing or argument, the Commission denied the request for waiver and dismissed the application. Its order recited, *inter alia*, that the CONELRAD project "contemplates utilization of existing broadcast facilities, and does not contemplate major broadcast station changes in order to fit them into the plan of operation * * * [and] That a compelling need for the waiver requested has not been shown." A petition for rehearing was also denied. This petition included a request for either oral argument or a hearing "to determine whether or not * * * good cause exists" or "the public interest, convenience, and necessity would be served" by a grant of the application and request for waiver.

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[2] 47 C. F. R. § 3.41 (Cum. Supp.). Under § 1.361 (c), 47 C. F. R. § 1.361 (c) (Rev. 1953), applications in conflict with a rule will not be considered defective if they are accompanied by a request of the applicant for waiver of the rule.

[3] 47 C. F. R. § 1.701 (Rev. 1953).

Section 308 of the Communications Act of 1934, as amended,[4] provides for the filing of the application involved here. Consideration of the application, therefore, is governed by the procedural requirements of § 309 (b).[5] Under this section, if the Commission cannot find that a grant of an application would serve the public interest, "it *shall* forthwith notify the applicant * * * of the grounds and reasons for its inability to make such finding" and "the applicant *shall* be given an opportunity to reply."[6] If the Commission is still unable to make the necessary finding, "it shall formally designate the application for hearing." Here the Commission failed to follow the required statutory procedure. Hence its order denying appellant's application for a single transmitter must be set aside and the case remanded to the Commission.

We think our recent decision in *Storer Broadcasting Co.* v. *Federal Communications Comm'n*[7] answers the Commission's contention that § 309 was properly disregarded because the application conflicted with § 3.41 of its rules. The "exceptions to the apparently unqualified generality of § 309 (b)"[8] which we described in *Storer* were of a limited nature. Clearly the conflict with § 3.41 presented by appellant is not of the character encompassed in those exceptions. We hold, therefore, that where, as here, an application accom-

[4] 66 Stat. 714, 47 U. S. C. § 308 (1952).

[5] 66 Stat. 715, 47 U. S. C. § 309 (b) (1952).

[6] Emphasis supplied.

[7] — U. S. App. D. C. —, — F. 2d — (No. 12065, decided Feb. 24, 1955).

[8] — U. S. App. D. C. at —; — F. 2d at — (slip opinion, p. 6).

panied by a request for waiver of § 3.41 is supported by reasons which are neither frivolous nor unlawful on their face,[9] the Commission is bound to observe the requirements of § 309 (b).

Upon remand, the Commission should either grant the application or follow the procedure outlined in § 309 (b). In light of this disposition, we withhold comment on questions raised concerning the merits of the application.

The orders of the Commission are vacated and set aside and the case remanded to the Commission for futher proceedings not inconsistent with this opinion.

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[9] Appellant's application could not fairly be characterized as frivolous in view of previous authorizations to use power of one kilowatt for regular operations as a Class II station and five kilowatts for CONELRAD operations. Moreover, while not explicitly so stated, it was readily apparent that the reason for requesting permission to install a single transmitter was to avoid the greater cost which would be entailed by the installation of two transmitters, thereby saving the public funds of the City of New York.